

Fair Political Practices Commission

MEMORANDUM

To: Chairman Randolph and Commissioners Downey, Karlan, Knox, and Swanson

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Subject: Pre-notice Discussion of Proposed Regulation 18702.6 – “Segmentation” Rules.

Date: May 23, 2003

I. SUMMARY

This memorandum discusses the Commission’s segmentation rules in response to concerns raised by the County of San Diego regarding application of the conflict-of-interest rules to general plan decisions. (See staff memorandum dated May 23, 2003, “Overview of Public Generally Regulations as Applied to General Plan Decisions.”) In such decisions, an official may disqualify himself or herself from participating in one or more decisions which are complex in nature and relate to other decisions in which the official may not have a conflict of interest. The proposed regulation codifies Commission staff advice explaining how an official may “segregate” a decision in which the official has a conflict of interest from other decisions in which he or she does not have a conflict of interest to allow participation by the official in one or several related decisions.

The segmentation process is viewed by staff as a viable approach for enhancing a disqualified official’s participation in general plan and other similar types of complex decisions. This process can be applied to a series of related decisions regardless of the subject area of the decisions. Consequently, while the segmentation process has frequently been applied to general plan decisions and budgetary decisions, the proposed language, if adopted, can be applied to decisions in any context. As such, this memorandum focuses on the segmentation process in general as staff believes it merits separate consideration.

II. BACKGROUND

The Political Reform Act (the “Act”)¹ prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100 et

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

seq.) In general, a public official has a financial interest in a decision, resulting in a conflict of interest for the official, if it is reasonably foreseeable that the decision will have a material financial effect on the official, unless a particular exception applies.

(*Ibid.*)

Under Commission rules (regulations 18700 – 18706), a conflict of interest exists where:

Step 1: The individual is a “public official.”

Step 2: The public official will be making, participating in making, or influencing a governmental decision.

Step 3: The public official has an “economic interest.”

Step 4: The economic interest is directly or indirectly involved in the decision.

Step 5: The financial effect of the decision on the public official’s economic interests will be material based on the applicable materiality standard.

Step 6: The material financial effect of the decision on the public official’s economic interests will be reasonably foreseeable.

There are two statutory exceptions to the conflict-of-interest provisions of the Act. (Regulations 18707 – 18708.) These exceptions will allow the official to participate despite the conflict of interest:

Step 7: The “public generally” exception.²

Step 8: Legally required participation.

Where the decision in which the official has a conflict of interest is related to other decisions, it may become somewhat confusing as to how broadly the Act’s disqualification rules apply. As a result, the Commission staff has developed a process to guide officials in determining whether they may participate in decisions in which the official is not disqualified.

III. COMMISSION ADVICE

A. SEGMENTATION PROCESS

Since 1986, Commission staff has advised that once it has been determined a public official has a conflict of interest, the official may utilize the Commission’s “segmentation” analysis to determine if he or she could participate in related decisions.³ (See *Huffaker* Advice Letter, No. A-86-343; *Patterson* Advice Letter, No. I-01-179; *Woodruff* Advice Letter, No. A-01-157; *Jackson* Advice Letter, No. A-01-056.) This analysis permits an official to segregate those decisions in which he or she has a conflict

² The “public generally” exception is discussed at length in the accompanying memorandum addressing general plans.

³ The Commission uses the terms “segment” and “segregate” interchangeably; “segmentation” and “segregation” describe the same procedure. “Bifurcation” is also used, albeit less frequently, to refer to this procedure.

of interest from those decisions in which he or she is permitted to participate. The following is common advice given to an official with a conflict in one of a series of decisions:

“...[u]nder certain circumstances, a public official disqualified from one decision may participate in other related decisions provided that the official’s participation does not affect the decision in which he or she has a conflict of interest. (*In re Owen* (1976) 2 FPPC Ops. 77.) However, certain decisions are too interrelated to be considered separately, and in that event, a public official’s conflict on one decision will be disqualifying for the other.

Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. Thus, a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of another. For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (*Boogaard* Advice Letter, No. I-90-347.) Similarly, decisions regarding one aspect of a general plan may be so interrelated to other decisions that they may not be bifurcated, because one decision will effectively decide the other. (With respect to segmentation of decisions, *see e.g.*, *Merkuloff* Advice Letter, No. I-90-542; *Lindgren* Advice Letter, No. A-99-313; *Sweeney* Advice Letter, No. A-89-639; *Stone* Advice Letter, No. A-92-133a; *Ball* Advice Letter, No. A-98-124; and *Ennis* Advice Letter, No. A-94-203.)

Assuming that a decision can be logically segregated from other related decisions, the public body must then procedurally segregate the decision prior to allowing the public official with a related conflict to participate in the decision-making process. This entails three steps:

(1) the decisions in which the public official has a disqualifying financial interest should be segregated from the other decisions on the public body’s agenda;

(2) the decisions from which the public official is disqualified should be considered first, and a final decision should be reached by the public body without the disqualified official’s participation in any way; and

(3) once a decision has been reached on the issues in which the official is disqualified, the disqualified official may participate in the deliberations regarding the other related issues so long as his or her participation does not result in a reopening of the previous issues or in any other way affect the decisions concerning the previous issues in which the public official was disqualified from participation.”

(*Woodruff, supra.*)

In essence, the purpose of the segmentation process is to allow an official to participate in certain decisions which may be “related” but continue to prohibit the official’s participation in decisions that are “inextricably interrelated” to one in which the official is prohibited from participating under the Act.

B. “IMPLEMENTATION DECISIONS”

Also associated with the segmentation process is the idea that a public official should be allowed to participate in certain decisions which merely carry out an earlier decision made without the disqualified official’s participation, provided that none of the official’s economic interests will be materially affected by this participation.

Under this concept, a public official with a disqualifying conflict of interest in a particular decision may participate in subsequent decisions which implement, but do not revise, the fundamental decision in which the official had a conflict of interest. For example, in the *Martello* Advice Letter, No. A-92-471, the Commission advised that an official could lawfully participate in decisions on financing a theater complex, to the extent that such decisions did not alter the original decision to build the project, did not materially affect the scope of the project, or independently have a material financial effect on any economic interest of the official. Such decisions are “implementation decisions” in which the official does not have a disqualifying conflict of interest. (See also *Warne* Advice Letter, No. I-02-052; *McCain* Advice Letter, No. I-00-257; *Ramirez* Advice Letter, No. A-00-243; *Olson* Advice Letter, No. A-00-237.)

The concept of an “implementation decision” is often not distinct from the segmentation rules but, rather, applies to a particular type of fact pattern where application of the segmentation is appropriate. Where decisions are indeed “implementation decisions,” an official can participate in those decisions so long as they do not independently create a conflict of interest. (*Olson, supra.*) In other words, the public official will still need to assess whether the implementation decision will have a foreseeable and material financial effect on his or her economic interests. (*Ibid.*) This assessment is always required when the segmentation rules are applied.

IV. USE OF SEGMENTATION PROCESS: SPECIFIC DECISIONS

A. GENERAL PLAN DECISIONS

As noted, the segmentation process may allow public officials to participate in certain general plan decisions. For example, at the September 19, 2002, interested persons’ meeting addressing general plan issues, a representative for the Town of Windsor reported being able to successfully apply the segmentation procedure by dividing the town into quadrants. Workshops and other information gathering activities were conducted so that disqualified officials did not participate in decisions on quadrants

in which their real property was located. When it came time that a vote was required, the decisions were taken quadrant by quadrant. In this manner, Windsor was able to use the segmentation procedure.

In contrast, the County Counsel for San Diego has had a different experience in applying segmentation. The county contends that, while these rules can be applied to certain ministerial general plan decisions at the final stages of the amendment process, segmentation is frequently not feasible for the important decisions requiring an official's discretion since a general plan is required to integrate and address multiple land use factors. According to the county, the legal requirements for internal consistency among the elements, as well as between the general plan and subordinate laws or ordinances, often makes segmentation inappropriate. Another concern of the county is that segmentation will not alleviate the undesirable situation in which a public official is permitted to participate in other decisions except those dealing with his or her own district.

Despite this difficulty, the segmentation process can be used by officials disqualified from participating in a specific general plan decision. For example, the County of San Diego has sought to utilize the segmentation process for a land use map decision, the subject of a recent advice letter, *Sansone* Advice Letter, No. I-03-058 (Attachment 1). In that letter, the county was advised if the land use map decision was segmented into smaller, more specific decisions so that these decisions could be considered separately, a supervisor disqualified from one decision might be able to participate in some of the more specific decisions leading up to the amendment of a general plan provided he or she did not have a conflict of interest in the more specific decisions. The letter stated that the Board of Supervisors may wish to first consider a map and density designation decision regarding "General Agricultural" parcels without participation by disqualified officials and then proceed with the decisions on the remaining types of parcels so that the officials could participate in the later decisions.

It is important to point out that, in the context of general plan decisions, staff has advised that once all the specific decisions related to a general plan have been finalized, the final vote to adopt, reject, or amend the plan will not require disqualification so long as the plan is not modified at that time. (See *Thomson* Advice Letter, No. I-00-239; *Diaz* Advice Letter, No. A-94-101; *Joehnck* Advice Letter, No. A-92-460; *Marino* Advice Letter, No. I-89-291.) The rationale for this rule is that the general plan, as implemented through each separate decision, will affect the public officials involved in a manner which is not distinguishable from the effect on the public generally. (*Joehnck, supra.*) This rule applies regardless of whether the decision is to initially adopt a general plan for a jurisdiction (*Diaz, supra*) or to amend an existing plan (*Joehnck, supra*).

B. BUDGET DECISIONS

The segmentation process has also been applied to budget decisions so that an official may be able to participate in decisions and discussions of an agency's general budget provided the budgetary decisions in which the official has a disqualifying

financial interest are segregated and the official follows the segmentation procedure described above such that the official does not participate in those aspects of the budgetary decisions in which he or she has a disqualifying financial interest. (*Russell* Advice Letter, No. A-95-157.)

Finally, the public official may also vote on the adoption of the final budget, despite the fact that the final budget includes items from which the public official is disqualified provided the decision cannot result in a reopening or in any way change the decisions from which the public official was previously disqualified. (*Billing* Advice Letter, No. A-00-203; *Russell, supra*; *Cook* Advice Letter, No. A-83-163.)

V. PROPOSED ADOPTION OF 18702.6

Staff believes that codification of the segmentation rules is useful for those decisions that do qualify for segmentation. Although the segmentation procedure is frequently outlined in advice letters, it is not provided for by regulation. During the Commission's Phase 2 Conflict of Interest Improvement Project, the segmentation issue was identified as an important issue warranting some examination. (Memorandum to the Commission regarding "Planning: Conflict of Interest Regulatory Improvement Project, Phase 2, July 21, 1999.) However, due to the large number of other issues that required more immediate regulatory action, staff recommended that segmentation be assigned a lower priority, and no further regulatory work on this item occurred.

Staff continues to believe that segmentation is an important issue and that codification of this advice would make it more accessible to officials attempting to comply with the Act, especially with regard to complex general plan and budget decisions. The following language of proposed regulation 18702.6 (Attachment 2) codifies Commission advice explaining how segmentation can be used as a tool to permit disqualified officials to vote in certain decisions:

“(a) An agency may segregate a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the public official has a disqualifying financial interest is segregated from the other decisions;
- (3) The decision from which the public official is disqualified is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official is disqualified has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision in which the official was disqualified.

(b) For purposes of this regulation, decisions are inextricably interrelated when, among other things, one decision is a necessary condition precedent, condition subsequent, or alternate to the other, or the result of one decision will effectively determine or nullify the result of another.

(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency's budget or to adopt, reject, or amend the general plan, so long as the budget or general plan is not modified at that time."

Subdivision (a) outlines the Commission's segmentation procedure. Subdivision (a)(1) provides that only decisions which are NOT "inextricably interrelated" can be segregated under the segmentation procedure. Subdivisions (a)(2) – (4) specify the steps which must be completed.

Subdivision (b) clarifies when decisions are "inextricably interrelated" in order to identify when segmentation of the decisions cannot be applied.

Subdivision (c) codifies special rules relating to final decisions concerning an agency's budget and general plan adoption or amendment decisions provided the adoption or amendment applies to the entire jurisdiction.

Because this language pertains to whether or not an official is deemed to be making or participating in making a decision in which he or she has a conflict of interest, staff proposes that this language be codified along with other Step 2 (Making, Participating in Making or Influencing a Governmental Decision) regulations.⁴

Staff Recommendation: Staff recommends codification of the segmentation rules. Codification of these rules will make the segmentation procedure more accessible to officials wishing to fully participate in governmental decisions before them while still affording compliance with provisions of the Act.

Attachments:

Sansone Advice Letter, No. I-03-058 –Attachment 1
Proposed Regulation 18702.6 – Attachment 2

⁴ If the Commission decides to adopt this language, staff will review regulation 18700, the "roadmap" regulation for the Commission's conflict-of-interest rules, to determine if any additional regulatory changes are necessary to maintain conformity.